Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
The Commission's Forfeiture	)	CI Docket No. 95-6
Policy Statement and	)	
Amendment of Section 1.80	)	
of the Rules to Incorporate	)	
the Forfeiture Guidelines	)	

To: The Commission

PETITION FOR RECONSIDERATION

Tidewater Communications, Inc. ("Tidewater"), licensee of radio stations WNOR, and WNOR-FM, Norfolk, and WAFX(FM), Suffolk, Virginia, by its counsel, pursuant to Section 1.429 of the Commission's Rules, hereby respectfully submits its petition for reconsideration of the above-captioned *Report and Order*, 62 Fed. Reg. 43474, published August 14, 1997 (The "*Forfeiture Policy Statement*"). Tidewater is an "interested person" under Section 1.429(a) of the Rules since it is the recipient of an Order of Forfeiture, of which Tidewater has sought reconsideration.[1]

Premise of this Petition

At ¶¶ 32-36, pp. 16 - 18 of the *Forfeiture Policy Statement*, the Commission announces a policy by which it will use "the underlying facts of a prior violation . . . in a subsequent renewal, forfeiture, transfer, or other proceeding . . . ."[2]

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[1]The *Forfeiture Policy Statement* was published in the Federal Register on August 14, 1997; thus, this petition is timely filed.

[2]*Forfeiture Policy Statement* p. 17, ¶ 34.

Section 504(c) of the *Communications Act of 1934, as amended* (the "*Act*") provides in pertinent part that:

> In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this Act, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order becomes final.

47 U.S.C. § 504(c).

Despite the fact that the plain language of Section 504(c) of the *Act* precludes the Commission from considering the Commission's finding of fact in a proceeding under Section 503 "in any other proceeding before the Commission . . . ," the Commission relies on language in the Senate Report[3] to interpret the statute in a manner allowing the FCC to do just that.

Tidewater respectfully submits that the Commission's use of the Senate Report to interpret Section 504(c) of the *Act* in a manner contrary to the plain language of the statute is both contrary to law and case precedent.

It is virtually *Hornbook* law that a forfeiture is a penalty when applied to a Commission licensee for alleged violations of the *Act* or the FCC Rules, just as a forfeiture is a penalty when applied to a licensed driver charged with going through a red light. In both cases, the statute is to be strictly, not broadly construed.

> When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation

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[3]See *Forfeiture Policy Statement*, pp. 16-17, ¶¶ 33-34.

> that if the legislature had thought of it, very likely broader words would have been used.[4]

As Mr. Justice Holmes taught us in *Pine Hill Coal Co. v. United States*, 259 U.S. 191, 196 (1992):

> It is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage.

Yet this is precisely what the Commission has done in deviating from the plain language of Section 504(c) of the *Act* to allow a fact to be used in another FCC proceeding, when the forfeiture has not been paid, nor has a court of competent jurisdiction ordered such payment.

The statutory scheme of Section 504(c) of the *Act* makes the United States District Court the sole forum for adjudication of the findings of fact in a forfeiture proceeding, in which forum the defendant is entitled to a trial *de novo*.

> The fact that Section 504(a) does not expressly provide for initiation of review by aggrieved licensees in no way renders the district court an inadequate forum. If, notwithstanding the protection furnished by Section 504(c), a licensee is suffering from demonstrably adverse consequences from government delay in initiating the collection proceeding, we assume that the licensee could bring a declaratory judgment action against the United States in the district court, and that all issues of fact and law presented by the licensee would be subject to the trial de novo procedure set forth in Section 504(a).

Pleasant Broadcasting Co. v. FCC, 564 F.2d 496 (D.C. Cir. 1977).

In a trial *de novo*, the federal district court is not limited to a review of the administrative record before the FCC, as is the Court of Appeals. "Such full *de novo* review is quite appropriate in this sort of case inasmuch as the Commission is both prosecutor and judge in forfeiture

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[4] *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes).

proceedings under 47 U.S.C. § 503." *United States v. Summa Corp.*, 447 F. Supp. 923 (D. Nev. 1978).

Thus, it is the district court, in a Section 503 proceeding under the *Act,* that is to make the final determination as to whether the defendant has violated the *Act.* The FCC has the power to request the office of the United States District Attorney to initiate such a proceeding. To allow the Commission to have the power to use findings of alleged violations of the *Act* in other proceedings without such a district court finding is in patent violation of the plain language of Section 504(c).

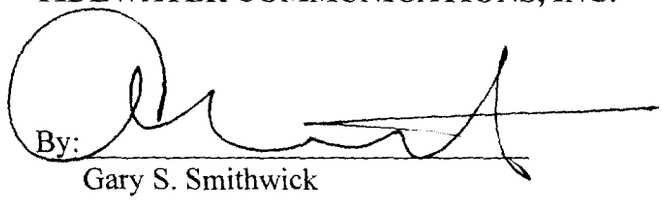
Under the Commission's construction of the intent of Section 504(c) of the *Act*, a Commission finding of a violation could be used to increase the amount of subsequent forfeitures. Thus, in a case in which the district court, during a Section 504(c) *de novo* review,[5] finds that the Commission was in factual error, the Commission's factual error could have been previously used to increase the amount of forfeiture for subsequent similar violations. This is clearly what the Congress tried to prevent in adopting Section 504(c) of the *Act.*

[5]See, e.g. *U.S. v. Rust Communications Group, Inc.* 40 RR 2d 621 (E.D. Va., 1976).

Therefore, it is respectfully submitted that the Commission should not use the facts of an unpaid or unadjudicated Notice of Apparent Liability in any subsequent proceeding directed against the licensee.

Respectfully submitted,

TIDEWATER COMMUNICATIONS, INC.

By: 

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